Supreme Court, U.S.
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Docket No.

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

Tenna Phipps Lang, Petitioner,

v.

O. Fayrell Furr, Jr., Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FOR THE SOUTH CAROLINA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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55 pp

QUESTIONS PRESENTED

I. Whether the South Carolina system of courts has denied Petitioner equal protection of the laws by preventing her from presenting, or referring to, or any reference to the *Community Standard of Care* expected of an attorney and/or the American Bar Association *Cannons of Professional Responsibility* to the jury for its use as a benchmark by which to gauge the performance of an attorney in a legal malpractice case.

II. Whether the lack of a definitive standard of care, in South Carolina, relating to an attorney's communicating an offer of settlement to a client, has served to deny Petitioner the equal protection of the laws.

II. Whether the lack of a definitive standard of care, in South Carolina, relating to an attorney's communicating an offer of settlement to a client, has served to deny Petitioner the equal protection of the laws.

III. Whether litigant participation in juror selection must be considered a fundamental right

IV. Whether a litigant can be held to an untenable standard in a legal malpractice

V. Whether Petitioner, as a Pro se litigant, has been denied equal protection of the law through the application or misapplication of South Carolina Rules of Civil Procedure and through erroneous action of the Appellate Court of South Carolina.

VI. Whether Petitioner was denied her Constitutional Right to a "fair" trial by Respondent's calling of the trial judge, by surprise, to testify even after he was continually unavailable for deposition by Petitioner under color of being judicially "busy."

VII. Whether a trial judge can charge the jury with charges where no evidence has been presented at trial to support the charge or where the charges are simply not available. Whether the Appellate Court can refuse to address these issues when raised and argued on Appeal.

VIII. Whether the Petitioner was denied her Constitutional Right when the trial judge charged the jury that they could not be concerned about what they may think the law should be but, for this case, only with what he charged the law to be.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i, iii
INDEX TO APPENDICES	vi
TABLE OF AUTHORITIES	vii,viii
OPINIONS BELOW	1A-14A
JURISDICTION	1
STATUTORY PROVISION INVOLVED	1
STATEMENT	2
A. BREACH OF CONTRACT AND LEGAL MALPRACTICE CASE LANG V FURR UNDERLYING CASE LANG V LADY INTERNATIONAL	
REASONS FOR GRANTING THE PETITION	
I. SC Court of Appeals rulings, Opinion No. 95-UP-218 and Opinion No. 89-MO-080, conflict with other State Decisions, and with this Court. These rulings acted to deny Petitioner Equal Protection of the Laws in violation of the United States Constitution, Amendment XIV, Sec. 1	21
SC Supreme Court denied Petition for Writ of Certiorari	.6A
28 U.S.C. 2403 (b) and Section 237, as amended	1
II. This Case Presents Critical Questions to protect Constitutional Rights to equal protection of the laws because of the lack of a standard of care for lawyers in South Carolina, thus effectively giving lawyers unlimited/absolute immunity from liability for breach of contract, negligence, and legal malpractice	5,11
III. The operative "Standard" in South Carolina has been misapprehended and grossly misapplied by the Court. Adequate relief from this error cannot be	

obtained in any other form or from any other court. 11,14

IV. The Decision of the Court of Appeals in Lang v Furr is erroneous, containing fatal errors which, on the face, should serve to invalidate it, because it denies Petitioner the equal protection of the laws. 14,16

V. The Court of Appeals decision in the underlying case of Lang v Lady International erroneously based its conclusion(s) on the sufficiency of the evidence even though the court, was prohibited from so doing by the Supreme Court's prior ruling, and it should, therefore, be invalidated because it denies Petitioner the equal protection of the laws. South Carolina Supreme Court denied Petition for Writ of Certiorari. 21

VI. Petitioner is Constitutionally entitled to a "fair" trial. The trial judge testifying for Respondent, which could have been done by deposition, is so egregious as to completely violate the bounds of courtroom fairness. 27

VII. The Court of Appeals discriminated against litigant, appearing Pro se, by refusing to address the Trial Judge's errors, in the charges to the jury, argued on appeal such as contributory negligence, assumption of the risk, estoppel, void of any evidence at trial to support the charge denying Petitioner equal protection of the law and fair conduct of litigation. 27

VIII. The Petitioner was denied her Constitutional Right when the trail judge charged the jury that they could not be concerned about what they may thing the law should be but, for in this case, only with what he charged the law to be.. 28

CONCLUSION. 30

INDEX TO APPENDICES

APPENDIX A Decision of Court of Appeals Opinion No. 95-UP- 218 LANG v FURR, Heard May 4, 1995 Filed July18, 1995 1a

APPENDIX B Court of Appeals Opinion No. 89-MO-080 in the underlying case of LANG v LADY INTERNATIONAL Heard April 11, 1989 Filed May 31, 1989 11a

APPENDIX C Order Denying Rehearing August 23, 1995. 15a

APPENDIX D Denial of Petition for Writ of Certiorari to theSouth Carolina Supreme Court February 22, 1996. 16a

APPENDIX E United States Supreme Court-Extension time to file Petition for Writ of Certiorari granted to and including June 22, 1996. 17a

TABLE OF AUTHORITIES

Cases	Page
Alston v Blue Ridge Trading Co., 108 S.C. 292, (S.C. App. 1992).	17
Bailey v Central Vermont R. Co. 319 US 350-354 (1943).	15
Berman v Rubin, 138 GA. App. 849, 227 S.E. 2d 802, 806 (1976).	5
Carlson v Fredrikson & Bryon, 475 N.W. 2d 882, (Minn. App. 1991).	17
Chocktoot v Smith, Or., 571 P. 2d 1255.	20,26
Cianbro Corp. v. Jeffcoat and Martin, 804 F. Supp 791 (D.S.C. 1992).	6
Cochrane v Little, 7 Md 323, 18A 698	26
Davis v Virginian R. Co., 361 U.S. 354, 4 L ed 2d 366, 80 SCT 387.	7,20
Een v Consolidated Freightways, 220 F. 2d 82	23
Garrett et.al. v Snedigar et al, 359 SE 2d 283 (SC CA 1987)	17
Georgia v Brailsford, et.al., (1974) US Supreme Court.	28
Glenn v Haynes,192 VA 574, 66 SE 2d 509, 26 ALR 2d 1334.	26
Gunning v Cooley, 281 US 90.	15
Jacob v New York City, 315 U. S. 752.	15
Kemmerlin v Wingate, Wilson, Wingate and Peterson South Carolina Supreme Court No. 2109	6
Norris v Alexander, 142 S.E. 2d 214.	10
Peavy v Ross (1987 App.) 292 SC 535, 357 SE 2d 482.	22
Rouse v Dunkley & Bennett, Supreme Court of Minnesota No. C6-93-777.	
15,18Tiller v Atlantic Coast Line R. Co. 318 US 54.	18
Truax v Corrigan, 257 US 312, 331	26

Constitution, Statutes, Regulations, Guidelines and Rules

U.S. Const. Amend. XIV (1). 1

28 U.S.C. 1254. 1
The Constitution of the United States of America, 1789. . 1,23,26
The Constitution of the State of South Carolina, 1976. . . 29
The Constitution of the State of Maryland. 29
The Constitution of the State of Georgia. 29
Constitution (Amendment VI) U.S.C.A. Const. Amend 7. 23

Rule 50 South Carolina Rules of Civil Procedure. . . . 21,23,24
Rule 50 Federal Rules of Civil Procedure. 23,25

S. C. Const. Art. v, 21 28

Emanuel v Kansas City Tile & Trust Co., Supra. 22

Attorney's At Law, 7 AM Jur 2d 26

Appellate Practice & Procedure {8}. 22

The Canons of Professional Ethics 10

Tenna Phipps Lang, appearing Pro se, petitions for a Writ of Certiorari to review the judgments of the South Carolina State Court of Appeals. The Petition for Writ of Certiorari to the Supreme Court of South Carolina was denied.

OPINIONS BELOW

Tenna Phipps Lang v). Fayrell Furr, Jr. SC Court of Appeals Unpublished Opinion No. 95-UP-218.

Tenna Phipps Lang v Lady International Fitness Center SC Court of Appeals Unpublished Opinion 89-MO-080.

JURISDICTION

The South Carolina Court of Appeals affirmed the judgment of the Circuit Court July 18, 1995.

Petition for rehearing was denied, August 23, 1995.

Petition for Writ of Certiorari to the Supreme Court of South Carolina was denied February 22, 1996.

Extension to file Petition for Writ of Certiorari to the Supreme Court of the United States was granted May 22, 1996.

The Jurisdiction of this Court is invoked under 28 U.S.C. 1257 (a)

CONSTITUTIONAL PROVISIONS AND STATUES

United States Constitution:

Fourteenth Amendment (1): "....No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On August 19, 1991 Tenna Phipps Lang, Petitioner, sued

attorney O. Fayrell Furr, Jr., for Breach of Contract and Legal Malpractice arising out of his representation of her in a personal injury action for negligence and gross negligence against Lady International Fitness Center "Health Spa" and Hoggan Health Industries (manufacturer of the exercise machine). The jury returned a verdict for Furr. Lang appealed issues of the trial court rulings.

While Lang was exercising at Lady International Health Spa in Myrtle Beach, South Carolina, on July 16, 1984, she was seriously and permanently injured when an exercise machine malfunctioned. The machine that injured Lang was a lateral pull-down machine, nine feet in height, with a twelve pound, solid steel "dorsey bar" attached to a cable at the top of the machine with an "eyebolt", with weights attached to the cable.

During discovery, it was revealed that Lady International had modified the exercise machine by replacing the "eyebolt" with an open "S" hook and by substituting an in-house cable of shorter length which made the exercise machine dangerous and unsafe.

In ordinary use by Lang, the "S" hook became disengaged from the cable thus releasing the twelve-pound, solid-steel dorsey bar-- which came flying through the air crashing on top of Lang's head -- rendering her unconscious and causing serious and permanent injuries.

It was undisputed fact at the trial of Lang v Lady International that the "Spa" had assembled this particular piece of exercise equipment in contravention of the manufacturer's written directions by failing to use the "eyebolt" and cable, as designed and specified by the manufacturer; but instead, substituted an open "S" hook for the required "eyebolt" and also substituted an in-house cable of shorter length, not otherwise approved of or supplied by the manufacturer, which made the exercise machine dangerous and unsafe. This was a deliberate disregard of the manufacturer's

assembly instructions. The "Spa" knowingly permitted its clientele to exercise on this dangerous and defective exercise machine.

Furr settled Lang's claim against Hoggan Industries for $25,000.00 and proceeded with her action against Lady International in the amount of $5,000,000.00. Lang later learned, during the appeal of Lang v Furr, that Lang's actual total damages, calculated by economist Oliver Wood for Furr, was $7,158,306.00.

The present case, Lang v Furr, came to trial in the Court of Common Pleas for Horry County, SC May 17, 1993, and on May 20, 1993, the jury rendered a general verdict for the Respondent. An order of judgment by David McInnis, the trial judge, was entered in favor of the Respondent on July 7, 1993.

The actions of trial Judge McInnis and his charges to the jury virtually insured the protection of the Respondent. As an example, Judge McInnis erroneously granted the Respondent four directed verdict motions on disputed issues of fact. Issues which, by law, should have gone to the jury. In addition, the court arranged for Judge McGowan, the trial judge in the underlying case, to come and testify for attorney Furr. Over objection, Judge McInnis allowed Respondent to qualify Petitioner's witness Mr. McCutcheon, (attorney for the Health Spa in the underlying case), on cross examination, to testify both as a character witness and expert witness for Mr. Furr, without any prior notice to Petitioner, in addition to Mr. Brittian who was listed as Furr's expert witness.

Petitioner's counsel, Hans Paul & Associates, resigned from the case after the trial of Lang v Furr (having received a directive phone call from attorney Mr. Brittian) because they were overwhelmed by the "influence" at the trial Lang v Furr, thus forcing Petitioner to appear pro se in her appeal without any schooling in law or related experience, plus while suffering with chronic pain from the permanent disability caused by the accident at the hands of Lady International Fitness Center.

Subsequently, Mr. Paul committed suicide by a gun shot to the head.

Petitioner is entitled to equal protection and application of the law and to due process which, were denied her at trial and on appeal. Evidence by the Record.

The Court of Appeals affirmed the judgment of the circuit court in Tenna Phipps Lang v O. Fayrell Furr, Jr., Op. No. 95-UP-218 (S.C. Ct. App. filed July 18, 1995).

The Petition for rehearing was denied, August 23, 1995.

The Petition for Writ of Certiorari to the South Carolina Supreme Court was denied February 22, 1996.

Petitioner seeks a Writ of Certiorari to review that decision.

Extension to file Petition for Writ of Certiorari to the Supreme Court of the United States was granted May 22, 1996.

REASONS FOR GRANTING THE PETITION

The Court Opinions cited are erroneous. The "standard" has been grossly misapplied. There is a legal controversy and a direct conflict with the rulings of the legal issues of the SC Court of Appeals, other State Courts, Federal courts, and this Court. There is a direct conflict between the decision of the court of appeals ruling in the underlying case Lang v Lady International and that of the highest court of this state and that conflict concerns federal questions which the lower court used to block critical issues in the malpractice case Lang v Furr.

Judge McInnis, the trial judge in Lang v Furr, granted Respondent four directed verdict motions on highly disputed issues which, by law, should have gone to the jury. This case is illustrative of persistent and serious misapplication of the law. The impact of the decision below on the public is enormous.

I. The South Carolina system of courts deprived and denied Petitioner equal protection of the laws by preventing her from presenting, or referrring to, or any reference to the *Community Standard of Care* expected of an attorney and/or the American Bar Association *Cannons of Professional Responsibility* to the jury for its use as a benchmark by which to gauge the performance of an attorney in a breach of contract and legal malpractice case.

In Lang v Furr, the trial court granted Respondent's directed verdict motion in limine, disallowing any reference by Petitioner's expert legal witness, Grover Seaton, to specific ethical rules or standards of care, ABA cannons, or other guidelines. In the ruling by the Court, Seaton could only testify as to the "general" standard of care.

The trial judge instructed and charged the jurors:

> "To determine whether a particular act is negligent, you should compare that act with the manner in which a person of ordinary reason and prudence would have acted in similar circumstances. But we're not talking about just a person in this case, we're talking about the negligence of an attorney. So you must find that this attorney in this case, this defendant, breached the standard of care generally recognized and accepted by average competent attorneys in the community and not necessarily the reasonable man in the community."

Jurors on a legal malpractice case are hardly expected to be knowledgeable reviewers of legal performance. Therefore, they need specific standards and benchmarks of performance by which to gauge the suitability of a lawyer's performance.

In Berman v Rubin, 138 GA. App. 849, 227 S.E. 2d 802, 806 (1976) and Cianbro Corp. v Jeffcoat

and Martin 804 F. Supp 791 (D.S.C. 1992) the courts said the following:

> "Expert testimony is required in most legal malpractice cases because 'the jury cannot rationally apply a general statement of the standard of care unless it is aware of what the competent lawyer would have done under similar circumstances.'
>
> "This general standard of care is not, however, particularly helpful in assessing specific instances of alleged malpractice. Therefore, as in other professional malpractice actions, the plaintiff in a legal malpractice action ordinarily must establish by expert testimony the specific duty of care required of the attorney and the breach thereof." Cianbro Corp . v Jeffcoat and Martin 804 F. Supp 791(D.S.C. 1992)

Also in Kemmerlin v Wingate, Wilson, Wingate and Peterson, -- No. 21097, the Supreme Court of South Carolina said:

> (6) In determing whether accountants have used requisite reasonable care and competence, expert testimony usually will be necessary to establish both the standard of care and the defendant's departure therefrom.
> (7) Negligence: Juries must be informed of criteria upon which a defendant's conduct, charged as negligence, is to be judged.

Petitioner argued that, in the absence of evidence of the American Bar Association *Cannons* or other guidelines, the jury would have had no basis for understanding what kind of skill or behavior could reasonably be expected of a practicing attorney. By

depriving Lang of the opportunity to provide an accepted measure of expected performance, the trial judge deprived the jury of any benchmark of performance.

If the ABA *Cannons* or other guidelines cannot be used as a guide for a lay person serving as a juror, then it follows that, essentially, there could never be legal malpractice in the State of South Carolina, because, effectively there is no real standard of performance. Truly, any attorney could exercise whatever ever standard of care behooved him on any particular case, and then could later merely bring in a friend as his Lawyer and to testify as his legal witness that what the accused attorney has done is exactly the way he (the "expert" witness) does it in his office and there you have a different standard in every case.

The South Carolina Court of Appeals upheld the trial Judge's error in granting Respondent's motion in limine to exclude denying Petitioner the right to have her expert witness, Mr. Seaton, explain to the jury the specific duty of care required of the Respondent in this case and the breach thereof. In a legal malpractice case, presentation of an "official" standard of care must be considered a fundamental right.

Proof of malpractice requires two evidentiary steps:

> "Evidence as to the recognized standard of the medical community in the particular kind of case, and a showing that the physician in question negligently departed from this standard in his treatment of Plaintiff. Davis v Virginian R. Co., 361 U.S. 354, 4 L ed 2d 366, 80 SCT 387.

Petitioner's issue involves a novel question of law which arises with the emergence of ardent consumerism related to the competence of lawyers. Just as the South Carolina Supreme Court is currently first addressing the issue of public acknowledgment of

complaints against members of the bar in South Carolina, the Court should and must provide a definitive statement of by what standards the conduct of the state's lawyers can or should be gauged.

Since jurors on a legal malpractice case are not knowledgeable reviewers of legal performance, they need various standards and benchmarks of performance by which to gauge the suitability of the lawyer's performance. Petitioner's jurors were denied this benchmark by which to measure Respondent's performance and, as a result, the Petitioner was denied her opportunity for a jury of her peers to pass knowledgeable judgment on whether she was wronged by her attorney. For this reason the Petitioner has been denied her Civil Rights and equal application and protection of the laws.

The Court of Appeals Opinion No. 95-UP-218 stated:

> "Ostensibly, Lang wanted to establish Furr's violation of canons and ethical rules amounted to violation of a statute, or negligence per se. '... The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing counsel as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or extradisciplinary consequences of violating such a duty.
>
> Therefore, we find no error in the trial court precluding Seaton from testifying about specific Rules of Professional Conduct or Canons of Ethics which Seaton felt Furr violated."

It's not what Seaton "felt" Furr violated; it's what the rules and standards either are or are not. It's then for the jury to decide whether Furr violated those definitive rules.
The Opinion also stated:

> "Further, in response to Furr's motion to exclude references to ethical rules or canons, the trial court ruled Seaton could testify as to proper standard of care and that's it. Seaton was qualified as an expert and testified extensively concerning the ways he believed Furr breached the standard of care. 'Assuming the court did in fact commit error in excluding the testimony, Lang has not demonstrated prejudice from the ruling.' "

The appellate Court Opinion made erroneous statements. The critical point here is the trial judge instructed and charged the jury: " ... You may consider the expert's opinion just as you do all other evidence in the case and it is for you, the jury, to give it such weight as you in your experience and discretion may determine. I mean you must weigh such evidence and accept or reject it or believe it or disbelieve it in the same manner as you treat all other evidence in the case, whether by an expert or a lay witness. (R p 545 lines 5-11)."

However, The Rules of Professional Conduct or Canons of Ethics that Furr violated are definite rules adopted as such by the South Carolina Supreme Court in 1956 and the jury would have been compelled to accept the rules as they apply and would not have been allowed to believe or disbelieve all, any, or none of the rules which existed pursuant to the South Carolina Supreme court's adoption of them. The Rules were simply the Rules. There is certainly a world of difference between the two -- an opinion and a rule. Therefore, the ruling by the lower court and the Appellate Court was seriously prejudicial to the Petitioner, depriving her of equal application of the law and due process.

Respondent argued that the Cannons of Professional Ethics, were strictly to be used for disciplinary action by the Bar. His

position was affirmed by the Court of Appeals, as stated in its opinion above.

However, The Supreme Court of South Carolina in Opinion No. 18345 May 12, 1965 said:

> [7,8] The Canons of Professional Ethics, as promulgated by the American Bar Association, were adopted as a Rule of this Court in l956, and such Canons represent the consensus of the bar on the standard that lawyers in their practice should follow and uphold. These Canons prohibit an attorney from engaging in practices that bring the courts or the legal profession into disrepute. When an attorney fails to render proper service he invites and merits disciplinary action. Norris v Alexander, 142 S.E. 2d 214.

But, according to the South Carolina Court of Appeals and rulings in this present case there is no standard of care in a case against an attorney for Breach of Contract and Legal Malpractice case in South Carolina. My cry for relief is on behalf of myself and all of the citizens in South Carolina who are suffering from the vestiges of a corrupt "good ol' boy," double-standard, self-serving legal system, which gives lawyers unlimited/absolute immunity from liability for Breach of Contract and Legal Malpractice, depriving myself and all citizens of their Civil Rights, due process of the law, equal application of the law, and equal protection of the law as provided in The Constitution of the United States.

Given the fact that the original complaint in Lang v Furr charges two causes of action, i.e., Legal Malpractice and Breach of Contract, the Petitioner did not need to prove that the result in the underlying case would have been different except for the acts or errors and/or omissions charged to the Respondent. The cause of action for Breach of Contract results from the Respondent's failure to exercise that Standard of Care required of him as prescribed by the CANNONS OF PROFESSIONAL CONDUCT.

II. The lack of a definitive Standard of Care, in South Carolina, relating to communicating an offer of settlement to a client, served to deny Petitioner THE EQUAL PROTECTION OF LAWS.

Respondent failed to convey, to his client, reasonable offers of settlement ranging from $550,000 and $750,000 to $900,000 advanced by Lady International Fitness Center. Such offers were within the range of reasonable settlement and would have been accepted by the Petitioner. To further affirm that she did not have any idea of the purported settlement offer, Petitioner testified (R.198, Lines 14-15) "If the Five Hundred and Fifty Thousand Dollars ($550,000.00) had been offered to me, I would have accepted it."

Respondent was not able to produce any field or office notes, or a diary or log of any type backing up his contention that he did, in fact, convey offers of settlement to the Petitioner.

> Respondent testified "... the $750,000.00 Seven Hundred Fifty Thousand Dollar offer in this case I think is great; but if we get a verdict, we could get a big one. And that is what I told her."
> Question: You didn't make any notes or document that?
> Answer: No.
> Question: Did you present that offer to her in writing?
> Answer: No.
> (R.p. 635 lines 10-16)

Respondent improperly assumed unto himself the right to decide the merits of settlement offers advanced by the Defendant Lady International and the Respondent independently declined such offers without the Petitioner's knowledge. The Petitioner wanted to settle the case and made such desires known to the Respondent well before the trial took place. Petitioner simply could not afford to chance losing the case and <u>any</u> settlement would be better than nothing. The Monies could be invested to provide some type of income for Petitioner's survival.

Petitioner's expert legal witness, Grover Seaton, testified that "... because of the nature of the injury and the amount of the offer that was made, that the matter should have been substantially confirmed communication by letter to Ms. Lang. I would think that the size of this offer would mandate it had she refused it ... the size of that offer, I would have asked the trial judge -- and I know that Judge McGowan would have allowed it -- for at least several hours, if not the entire day, to discuss that with the client, to go over other aspects of how you could improve that settlement, such as an annuity. (R.341 line 19-25, R. 342-343 thru line 17, R. 357 lines 14-25).

Seaton stated further that "... in a letter exchange, using a figure of $600,000.00 and general contingency is a third, the attorney has a $200,000.00 return that he should consider, secondarily to what his client's instructions are. It may greatly alter the contract between he and his client, i.e. you may want a second opinion as to whether or not this is an adequate offer; you may want to talk to an actuarialist pertaining to tax advantages; it may include the possibility of having another attorney take over the case containing an agreement as to what you as an attorney are owed because you are not of the opinion of the client. Seaton further states "there is all types of ways that it would reform the contract between you and your client. A reasonable attorney using the Standard of Care would give the client all information necessary to permit that client to make an informed and intelligent decision." (R. 344 lines 6-8. R. 345 lines 3-6).

Respondent has previously stated on direct examination (R.440 lines 1-5) that " I thought the offer at that time was five hundred; it now appears it was five-fifty, based upon what Mr. McCutcheon says. And I don't remember exactly but it was five or five hundred and fifty thousand dollars." (emphasis added) Obviously, Respondent didn't even know what the actual amount of the settlement offer was that he "thought" he conveyed to Petitioner.

The Respondent, **and only the Respondent**, knew that attorney McCutcheon, attorney for Defendant Lady International Fitness Center, before the trial, had evaluated the prospects of the case as 95% for the Plaintiff and 5% for the Defendant. Buoyed by this confidence, the Respondent chose to "roll the dice" for the glory of a win, disregarding his responsibility to his client.

Respondent is a very wealthy man and married to a very wealthy woman and his need for an ego-booster with a big win was more valuable to him than a few hundred thousand dollars as confirmed by his testimony above regarding the $750,000.00 offer; that's what he was thinking about -- the big win placing him on TV and in the newspaper. The news reporter from Channel 13, WBTW TV Florence, SC, was present every day covering the trial. An update on the trial was given on the television eleven o'clock news every night that the case was continuing and could be in the "millions of dollars." It's obvious Respondent was caught up in himself, evidenced by his intentionally and repeatedly excluding Petitioner from participating in all phases of the underlying suit of Lang v Lady International. Since Respondent did not allow Petitioner to sit in the courtroom during the trial she had no way of knowing what was being said or taking place in the courtroom.

Respondent's prosperity was a far cry from the position of the Petitioner who, as a result of the accident in July, 1984, at Lady International Fitness Center, rendered her permanently disabled, closed her business reducing her annual income from $100,000.00 a year plus other benefits to only social security disability -- a single woman with three children no child support and with barely enough to exist, unable to afford medical insurance, suffering with chronic pain and lost quality of life.

At no place in the trial or in the transcript is there any evidence or testimony that anyone heard any offer of settlement conveyed to Petitioner because **there was never an offer transmitted to her. In fact, no one, at any time in the trial, said that he or she ever heard Respondent even so much as mention**

a settlement offer to Petitioner. The truth is -- no one heard any offer of settlement conveyed to Petitioner because **there was never an offer transmitted to her.** (R.441 lines 17-21).

Since the jury was deprived of any benchmark of performance to judge the attorney's actions, they were so confused and, after the testimony of Mr. Brittian and Mr. McCutcheon, legal expert for Furr, indicating how so often their clients "leave the decisions up to them," and with the jury not knowing what the standard of care is, the jury was prevented from rendering anything but a general verdict for the Respondent.

Respondent's failure to convey such offers of settlement was such an obvious breach of any reasonable Standard of Care, relevant to a competent attorney, that he obviously failed to adequately perform on his contract with Petitioner and that his legal malpractice was prima facie. The Courts which supported Respondent to the detriment of Petitioner thus violated her Civil Rights, right to Due Process of the Law, and equal application and protection of the laws.

III. A litigant's participation in juror selection must be considered a fundamental, personal, constitutional right.

The trial judge granted Respondent a directed verdict motion on the issue of Plaintiff not being allowed by Respondent to participate in the jury selection, thus removing this highly disputed issue of fact from the jury. This ruling is in direct conflict with the following Federal Court Rulings:

> The jury is the tribunal under our legal system to decide that type of issue as well as issues involving controverted evidence. To withdraw such a question from the jury is to usurp its functions.

> Tiller v Atlantic Coast Line R. Co. {318 US 54}, Bailey v Central Vermont R. Co. 319 US 350-354-(1943).
>
> We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed question of fact, why it should not decide such question as these as well as others. The right to trial by jury is "a basic and fundamental feature of our system of Federal Jurisprudence". Jacob v New York City 315 US 752.

Petitioner cannot imagine what type of evidence a plaintiff in a legal malpractice action could produce to prove that, had she been allowed to participate in the jury selection, she would have won her case. Should she have interrogated all the persons in the voir dire who were not selected to serve?

Nor do the defendant attorneys here suggest what that evidence would be. If proving "but for" were really the standard, it would effectively give lawyers unlimited immunity from liability for breach of contract and legal malpractice.

But, in any case, the question was one of fact for the jury. And, several courts have said: "... proximate cause is normally a question of fact for the jury." Rouse v Dunkley & Bennett, Supreme Court of Minnesota No. C6-93-777.

> " Issues that depend on the credibility of witnesses, and the effect or weight or evidence are to be decided by the jury. Gunning v Cooley 281 US 90.

Even in the face of these and other cases, however, the trial judge erroneously removed this issue from consideration by the jury. (The Court of Appeals Opinion is erroneous. Petitioner has argued this issue from the beginning of the appeal.)

IV. Petitioner cannot be held to an untenable standard in her legal malpractice action against O. Fayrell Furr, Jr.

As the Court of Appeals Opinion # 95-UP-218 (S.C. Ct. App. Filed July 18, 1995) Pg. 3a Id at 1-2 stated:

> "The third issue on appeal involves Furr's negligence in intentionally and repeatedly excluding Lang from participating in all phases of the suit, particularly jury selection, resulting in the seating of an antagonistic juror."

The trial judge ignored the law and rules of civil procedure and granted the Respondent a directed verdict motion on this disputed issue, removing it from the jury. The court of Appeals affirmed.

Petitioner's expert legal witness, Mr. Seaton, testified that the ultimate decision of seating a juror was the decision of the client, that it was fundamental, and that decision was basic to the entire process, and that once that process was polluted, then everything that followed was also polluted. Seaton stated Furr breached the standard of care by not allowing Lang's participation in the jury selection process.

The jury issue was a highly disputed issue of fact at the trial of Lang v Furr. There was, of course, a factual dispute as to whether Petitioner was present during jury selection. Petitioner and her son testified that Furr intentionally directed them to the County Administration Building, under the guise of an asbestos removal taking place in the main courtroom. Furr testified that Lang was present during jury selection, that he believed he should exercise a peremptory strike on Mr. Spivey, and that it was actually Lang and her family who wanted to retain Mr. Spivey as a Juror. (R. 183 line 1-R. 189 line 10).

> "...In order for a directed verdict to be proper, it not only must be clear that no issue of fact is involved, but the conclusions and inferences to be drawn from

the facts must be undisputed as well..."Garrett et al. v Snedigar et al 359 SE 2d 283 (SC CA 1987).

"In determing whether there are material issues of fact on a motion for summary judgment, all inferences from facts must be viewed in light most favorable to the party opposing the motion; accordingly, summary judgment is inappropriate if facts are conflicting..." Alston v Blue Ridge Trading Co., 108 S.C. 292, (S.C. App. 1992)

Court of Appeals Opinion No. 95-UP-218 pg.10a States:

"To presume Spivey's presence on the jury in the earlier case resulted in a unanimous jury verdict in favor of Lady International would be to engage in complete speculation, in view of Seaton's testimony. The jury in this case might draw that inference, but it would have no basis in the evidence. Accordingly we affirm the trial court's dismissal of this allegation of malpractice from the case."

If the jury could have drawn that inference, the issue could have been resolved in Petitioner's favor and, thus, the issue was inappropriate for summary judgment. Once again, Petitioner was deprived of her right to equal protection of the laws.

During Voir Dire questioning, a prospective juror, one Larkin Spivey, intentionally concealed that he was a neighbor who was antagonistic to the Petitioner and her children, yet he served as foreman of the jury. Respondent relied on Carlson v Fredrikson & Bryon, 475 N.W. 2d 882, (Minn. App. 1991). "To prove proximate cause in a legal malpractice case, a plaintiff must show that but for the attorney's alleged negligence, she most probably would have won at trial." Carlson v Fredrikson & Byron, P.A., 475 N.W, 2d 882,886 (Minn. App. 1991). This case was overturned

August 26, 1994 by Rouse v Dunkley & Bennett, Supreme Court of Minnesota No. C6-93-777 saying:

> "We disagree with the standard set out in Carlson, We cannot imagine what type of evidence a plaintiff in a legal malpractice action could produce at summary judgment to show that a factfinder in the underlying matter necessarily would have resolved factual disputes and credibility issues in his or her favor, nor do the defendant attorneys here suggest what that evidence would be.
>
> "The Carlson opinion was wrongly decided to the extent that it suggested that plaintiffs must show at summary judgment that it is more likely than not that the issue of causation would be decided in their favor and we reject the standard.
>
> " 'For negligence to be the proximate cause of an injury, it must appear that it the act is one which the party ought, in the exercise of ordinary care to have anticipated was likely to result in injury to others, then he is liable for any injury proximately resulting from it, even though he could not have anticipated the particular injury which did happen.' Rouse v Dunkley & Bennett, P.A., Supreme Court of Minnesota No. C6-93-777 August 26, 1994. This test is consistent with our prior legal malpractice cases, but we reverse because we conclude that the court of appeals incorrectly applied the test. We also stated that proximate cause is normally a question of fact for the jury. "

Mr. Seaton, expert witness for Petitioner in Lang v Furr, testified on the directed verdict motion regarding the disputed juror Spivey that it would be speculation to opine that the result would have been different. Mr. Brittian, expert witness of the Respondent, likewise testified to the effect that it would be speculation to opine that Mr. Spivey's presence on the jury changed the trial's outcome. (R.366 line 18-25, R. pp. 367-369 thru line 19)

Testimony from the trial transcript Lang v Furr:

By Mr. Baker:

Though there's one percent chance that the defense is going to win, if they win it's just utter speculation to say that had Mr. Spivey not been on the jury -- (R.368 Vol. II lines 12-14)

By the Court:

Well I agree with your analysis but it's a little different from a medical malpractice case when a doctor says, you know, "this doctor that performed the operation allowed this vein to be severed and he bled to death and if it hadn't been for that scientifically, the patient would have lived." (R.368 Vol II Lines 15-10)

By the Court:

When you are trying to read the minds of twelve jurors, how does any lawyer get up and say, "But for this, the case would have ended differently."?

By Mr. Baker:

Judge, that's exactly my point. It would be utter speculation. If Mr. Seaton had made that statement if he had testified like that, I would have been making the same motion on the grounds that as a matter of law, it is just pure and utter speculation. The law in South Carolina states proximate cause has to rise above surmise, conjecture and speculation. No lawyer could say that, I agree with you. That means there's no proximate cause. (R. 368 Vol II lines 24-25, R. 369 lines1-7.)

By the Court:

Well that means there's no legal malpractice either, in South Carolina.

By Mr. Baker:

No, sir, it -- well, on this kind of issue, on a tactical decision --

By the Court:

How could any lawyer in any legal malpractice case say the jury would have reached a different conclusion to a

reasonable degree of legal certainty? How could he ever say that in any case? (R. 369 Vol. II lines 12-15).
By the Court:

Well I think the testimony of Mr. McCutcheon that it was a ninety-five percent (95) percent (5%) position for the plaintiff as he evaluated the case, would give rise to the thought that something went wrong.

"Proof of malpractice requires two evidentiary steps: Evidence as to the recognized standard of the medical community in the particular kind of case, and a showing that the physician in question negligently departed from this standard in his treatment of Plaintiff." Davis v Virginian R. Co.,361 U.S. 354, 4 L Ed 2d 366, 80 S.Ct.387.

Petitioner's participation in the jury selection process must be considered a fundamental right and when Respondent intentionally directed Petitioner and her son to the County Administration Building, under the guise of an asbestos removal taking place in the main courtroom, Respondent violated the rules of professional practice and breached his contract to provide good and sufficient legal services to the petitioner. Respondent in his brief stated he mistakenly sent Petitioner and her son to the County Administration Building across the street from the main court house. If this were true why didn't he send someone over to get them before he selected the jury?

Respondents motion for directed verdict on the jury issue was made in limine and argued; however, the trial judge waited to grant the motion until the end of the trial, removing the highly disputed issue from the jury.

But,

"When evidence in legal malpractice case is such that reasonable people could differ whether defendant fell short of professional standard, jury must decide." Chocktoot v. Smith, Or., 571 P. 2d 1255.

The Petitioner was wrongly denied her right to a fair jury selection and to a fair subsequent trial. By law, the trial judge cannot grant a directed verdict on a disputed issue of fact. The Petitioner was thus denied her Constitutional right to equal protection of the laws.

V. Petitioner, as a Pro Se litigant, has been denied equal protection of the law through the application or misapplication of South Carolina Rules of Civil Procedure and through erroneous action of the Appellate Court of South Carolina.

There is a clear conflict of law between the Court of Appeals of South Carolina, The Supreme Court of South Carolina, this Court, other State Courts, and the Constitution of the United States.

The Supreme Court of South Carolina granted a motion to dismiss certain "exceptions on appeal" made by Mr. McCutcheon, Attorney for Lady International Health & Fitness Center ("Spa"), based on Rule 50 of the South Carolina Rules of Civil Procedure, on account of the failure by Furr to move for a directed verdict during the trial of Lang v Lady International. Mr. McCutcheon argued that Furr's failure prevented Furr from arguing, on Appeal, the critical issues of sufficiency of the evidence, negligence, and gross negligence which were the heart of Petitioner's case.

Once the Supreme Court granted Mr. McCutcheon's motion to dismiss the exceptions he noted, that ruling, i.e. that Furr had "failed to move for a directed verdict ...." became the law in the case.

Later, ignoring the Supreme Court ruling on McCutcheon's exceptions and disregarding the law as well as the State and Federal Rules of Civil Procedure, the South Carolina Court of Appeals issued its Opinion No. 89-MO-080. Lang v Lady International which directly ruled on the sufficiency of the evidence.

As its Opinion No. 89-MO-080 Lang v Lady International pg. 12a states:

> "The sole issue .... While appellant failed to draw an exception challenging the possible finding for respondent based on its general denial, we find there is sufficient evidence in the record...."

Subsequently, the Supreme Court of South Carolina denied Petitioner's Writ of Certiorari to review the Appellate court decision even though the South Carolina Court of Appeals Opinion No. 89-MO-080 Lang v Lady International is in direct conflict with the South Carolina Supreme Court's own ruling granting McCutcheon's Motion to Dismiss on this issue.

> "Objection to sufficiency of evidence cannot be raised for first time in motion for new trial; motion for directed verdict is prerequisite to motion for new trial on ground that evidence does not support verdict." Peavy v Ross (1987), App) 292 SC 535, 357 SE2d 482.
> Appellate Practice & Procedure {8.1} "Neither the court of appeals nor the parties can confer appellate jurisdiction, absent statutory authority."

The South Carolina Court of Appeals ruling is also in direct conflict with rulings of this Court.

> " Speaking of the necessity of the interposing a motion for a directed motion where the sufficiency of the evidence is to be challenged, we said in Emanuel v. Kansas City Tile & Trust Co., supra, 'But if the plaintiff intended to appeal in case the verdict went against him and to challenge the sufficiency of the evidence to support a judgment for the defendant, it was essential that he request the trial court to direct the jury to return a verdict in his favor and that he secure from the court a ruling upon his request.' "
>
> "In the absence of such a request and ruling, the question of the sufficiency of the evidence to support the verdict and judgment is not subject to review by this court. '. . . As this is an action at law, we have under

> the Constitution (Amendment VII), U.S.C.A. Const. Amend 7, no jurisdiction to review or reexamine the facts, but can consider only questions of law. In the absence of a motion for judgment in favor of defendant, or other similar proceeding challenging the sufficiency of the evidence, no question of law is presented for our consideration....' " Een v Consolidated Freightways 220 F. 2d 82.

> "The requirement of a proper directed verdict motion as foundation for a motion for judgment notwithstanding the verdict is not a mere technicality but serves vitally important interest in the fair conduct of litigation." Fed. Rules Civ. Proc. Rule 50 (a,b), 28 U.S.C.A.

Later, Furr claimed he consciously decided not to make a Motion for Directed Verdict in order to avoid reminding the Defendant Spa's Attorney, Mr. McCutcheon, of his own need or desire to make a similar motion.

But, since Mr. McCutcheon had already "evaluated" the case of Lang v Lady International before trial, at "95% in favor of the Plaintiff/Lang and 5% in favor of the Defendant/Spa, he had no need for, or intention of, filing an appeal or arguing the sufficiency of the evidence if Plaintiff won her case. Consequently, McCutcheon did not need to make a directed verdict motion since he never expected to win.

The point here is that in the legal malpractice case against Furr, the Trial Judge granted the Respondent a directed verdict motion in limine disallowing Petitioner from presenting his (Furr's) critical issue of failure to take an important action to protect the record, pursuant to Rule 50, South Carolina Rules of Civil Procedure, during the trial of Lang v International. The trial judge stated:

> "Your motion as to preclude any testimony as to the directed verdict is granted. (R.p. 70 line 19-20) 'I think to do otherwise would be me telling the Court of Appeals that they were wrong, which is often times my opinion, but I don't express it.' " (R. p. 70 line 25, p. 71 line 1-2).

The point is -- the Appellate Court was wrong and because of it, Petitioner was deprived of her constitutional right to equal application of the laws. The Appellate Court states in its Opinion **No. 89-MO-080 Pg.12a Par. 3 Lang v Lady International the underlying case:**

> The sole issue ... "While appellant failed to draw an exception challenging the possible finding for respondent based on its general denial, we find there is sufficient evidence in the record..."

The Court is saying that Furr, representing the Appellant, failed to draw an exception challenging the possible finding for Respondent Spa based on its general denial .... Surely this cannot be the Standard of Care expected of an attorney in the State of South Carolina?

The issue is critical to the malpractice case since the actions of the Petitioner's attorney in the case of Lang v Lady International, O. Fayrell Furr, Jr., were not the proper steps to protect the record for an appeal and Petitioner was deprived of the opportunity available throughout the judicial system to argue, on appeal, the errors of law committed by the trial judge during the trial depriving Petitioner of fair conduct of litigation to which she is entitled under equal protection of the law. (The Respondent and Trial Judge effectively managed to fabricate a method through the Appellate Court to protect themselves through the Appellate Court by ignoring the Supreme Court Ruling, thus protecting both of them should any further action be taken.) As evidenced in the

Appellate Court **Opinion No. 95-UP-218 Lang v Furr pg. 5a par.2,**

> "...Hence, even if Furr had made a directed verdict motion the trial court would have erred in granting the motion without allowing the jury to pass upon the contributory negligence defense. Accordingly, as a matter of law, Furr's failure to move for a directed verdict did not harm Lang and cannot serve as the basis for a claim of legal malpractice."

The Court of Appeals opinion is erroneous. The jury returned a general verdict in the case of Lang v Lady International and the court has no way of discovering which theory, facts, or issues the jury relied on reaching the general verdict.

Furr's failure did directly harm Lang by depriving her of the opportunity available throughout the judicial process to argue, on appeal, the errors of law committed by the trial judge during the trial of Lang v Lady International, depriving Lang of fair conduct of litigation to which she is entitled under equal protection of the law.

This Honorable Court has stated:

> The requirement of a proper directed verdict motion as foundation for a motion for judgment notwithstanding the verdict is not a mere technicality but serves vitally important interest in the fair conduct of litigation. Fed. Rules Civ. Proc. Rule 50 (a,b), 28 U.S.C.A.

Petitioner's expert witness Mr. Seaton testimony, Record on Appeal Vol. II, page 363 lines 10-15 states:

> Question Mr. Seaton: "In your opinion, would any of those motions have been successful if made by Mr. Furr?
> "I could not tell you that, That's not the issue.
> The issue is to protect the rights of your client in trial proceedings in case you need a post-verdict motion or argument for new trial or appeal."

Another State case ruled:

[4,5] " On the issue of professional negligence the predictability of adverse consequences in important evidence, but it is not the only evidence and whether a reasonably competent lawyer would have foreseen and recognized the risk is also relevant. "Cocktoot v Smith, Or., 571 P. 2d 1255 Attorney and Client. "In an action against an attorney for malpractice, it it the duty of the court to instruct the jury as to the degree of negligence or want of skill for which the attorney is properly answerable, and what duty is imposed on him by law; the jury then determines, (emphasis added) on all the facts and circumstances of the case, whether the defendant has performed his duty..." (Attorneys At Law," 7AM Jur2d) and

Cochrane v Little, (7 Md 323, 18 A 698), Cochrane mandates that the question of the directed verdict motion was a question for the jury -- at least as to whether the defendant has performed his duty ..."

In Glenn v Haynes, (192 VA 574,66 SE 2d 509,26 ALR 2d 1334) the court said, "Stated more succinctly, the degree of care required of an attorney is a question of fact to be determined by the jury ..."

Petitioner's Civil Rights have been denied. Petitioner is entitled to equal protection and application of the laws and due process provided by the Constitution of the United States.

Truax v Corrigan, 257 U.S. 312, 331, so indicates:

"It (due process of law), of course, tends to secure equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty and property, which the Congress or legislature may not withhold. Our whole system of law is predicated on the general fundamental principle of equality of application of the law, 'All

men are equal before the law'; 'This is a government of laws, and not of men:' 'No man is above the law,' *** are all maxims showing the spirit in which legislatures, executives, and courts are expected to make, execute, and apply laws."

VI. Judge McGowan, presided in Lang v Lady International testified for Respondent in Lang v Furr which is in direct conflict with the Judicial Code for Judges.

Petitioner is entitled to a "fair" trial. Bringing in the trial judge, by surprise, especially since he was continually unavailable for deposition by the Petitioner, is so egregious as to completely violate the bounds of courtroom fairness. Judge testified this was his first time ever in 25 years as a Judge.

VI1. The trial judge charged the jury with (contributory negligence, assumption of the risk, estoppel) where no evidence had been presented at trial to support the charge or where the charge is simply not available. Whether the Appellate Court can refuse to address the issues when raised and argued on Appeal, denying Petitioner equal protection of the law and fair conduct of litigation, related directly to the fact that Petitioner has been denied due process and the equal protection of the laws.

Appellate Judge Carol Connor asked at oral argument if the court was to consider all of the questions on appeal and was instructed "Yes," Mr. Lengel explained the only reason all of the questions were not being argued at oral argument is because it was impossible to argue sixteen issues in fifteen minutes. (Prior to oral argument an extension for more time was filed and denied.)

In its Opinion No. 95-UP-218 Pg. 4a footnote 1, the Appellate Court refused to address the issues discriminating against a litigant, appearing Pro se. The Opinion is erroneous.

In the beginning of the Appeal process, the Respondent made motions to strike which included anything he could squeeze in and the court granted all of his motions at that time and the related material was removed from the record early in the appeal.

VIII. The Trial Judge erred when he charged the jury that they could not be concerned about what they may think the law should be but only with what he charged the law to be.

The trial judge charged the jury that they could not be concerned about what they may think the law should be but only with what he charged the law to be. The trial judge (pg.56, Vol.III, lines 14-19) said, "You must accept the law as I give it to you. If I am wrong, there is another place and time for that error to be corrected, but for this case, (emphasis added) you must apply the law as I give it to you.

See S.C. Const Art V 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law.") This does not tell the judge to charge they could not be concerned about what they may think the law should be!!!! it says only to declare the law period.

The trial judge's charge to the jury runs counter to the finding in Georgia v Brailsford, et.al., (1794) in the Supreme Court of the United States. Chief Justice John Jay said, "... on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy."

The trial judge erred in his instruction to the jury and in so doing violated the constitutional right of the Petitioner to a jury trial, wherein the jury had the right to judge both the law as well as the fact in controversy. (R. 685-686, R. 689). The jury clearly had the authority to decide the case on whatever ground they chose particularly on the issue of contributory negligence, an erroneous charge by the trial judge.

The power of a jury to make any finding it chooses is absolute and finds its origins in the basic documents and foundation theories of the United States system of government. The power of the government comes only from the consent of the governed and the citizenry of the United States must and has reserved unto itself the power to judge the fairness of the law itself -- in addition to the facts of a case which involves any particular law.

Nowhere is this principle of jury power more appropriate than in cases involving the doctrine of *contributory negligence.* For years, the common citizenry has held the belief that the idea that even the merest contribution to the fault of an incident should bar the recovery of an aggrieved person from a defendant who might have been egregiously at fault is obnoxious, unfair, and at odds with appropriate social or public policy.

Unfortunately, even though the doctrine of contributory negligence was never a good idea, it was the law under which South Carolinians suffered until 1991. The people, however, knew "contributory negligence" was a bad idea and the people had the power, through jury verdicts, to strike down the concept of contributory negligence.

The fact that the law has changed -- with an effective date July 1, 1991, so close and prior to the trial of this case Lang v Furr, May 1993, clearly indicates that the popular view of that law was hostile.

The constitutions of both Maryland and Georgia specifically provide for juries to have the power to decide the law and the facts. In addition, American courts have never denied the jury's power to decide as it best see fit.

The trial judge should have charged the jury in accordance with the dictates of the Supreme Court of the United States which under the several Amendments to the Constitution, has guaranteed identical and precedential federal rights to the citizens of the several states. It is a fundamental right of the Petitioner to be given the protection of the Federal Constitution and of all of the relevant Supreme Court rulings concerning the rights of litigants.

CONCLUSION

South Carolina has perpetuated a self-serving, double standard which protects lawyers and which denies citizens the equal protection of the laws because the self-serving standard effectively provides attorneys with virtually unlimited immunity from breach of contract and from law suits for legal malpractice. Thus, denying Citizens of their "inviolate rights."

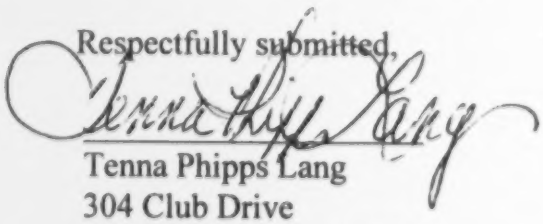
A recent short letter to the local county news paper regarding attorney malfeasance netted over three hundred letters and telephone calls in three days. This is an indication and confirmation of the legal abuse by the lawyers and the judicial system taking place here in South Carolina. The impact of the decision below on the public is enormous.

This Petition may be considered akin to a class action suit and warrants the exercise of this court's discretionary powers, adequate relief cannot be obtained in any other form or from any other court within South Carolina.

This case presents a rare opportunity for this Court to address this miscarriage of justice and to bring much-needed certainty and uniformity to this area to protect all citizens "inviolate rights."

Therefore, Petitioner begs the Honorable Court to grant this Petition.

Respectfully submitted,



June 20, 1996

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APPENDIX A

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Tenna Phipps Lang, ...Appellant,

v.

O.Fayrell Furr, Jr., ...Respondent.

Appeal From Horry County
David F. McInnis, Circuit Court Judge

Unpublished Opinion No. 95-UP-218
Heard May 4, 1995 - Filed July 18, 1995

AFFIRMED

James H. Lengel, of Columbia, for appellant.

Charles J. Baker, III, and Stanley C. Rodgers, both of Holmes & Thompson, of Chrleston for respondent.

PER CURIAM: Tenna Phipps Lang sued attorney O. Fayrell Furr,Jr., for breach of contract and legal malpractice arising

out of his representation of her in a personal injury action. A jury found for Furr. Lang appels a number of the trial court's rulings. We affirm.

In July 1984, while Lang was exercising at Lady International health spa in Myrtle Beach, South Carolina, she was seriously injured when an exercise machine malfunctioned. Lang retained Furr to represent her in an action against Lady International and the manufacturer of the equipment, Hoggan Health Industries, Inc.

The machine that injured Lang was a lateral pull-down machiner with a handlebar attached to a cable which holds weights with an "eyebolt." Discovery revealed that Lady International had modified the machine by replacing the "eyebolt" with an "S" hook. The hook disengaged, causing the handlebar to crash down on Lang's head, severely injuring her.

Lang settled her claim against Hoggan Industries for $25,000 and proceeded with her action against Lady International. Lady International defended primarily on the basis Lang was contributorily negligent in suddenly releasing ther handlebar, causing the weights to drop and strike against each other.

The case lasted three days. At the close of the evidence, Furr decided not to move for a directed verdict. Furr believed Lang was winning the case and did not want to remind opposing counsel to make a directed verdict motion. Counsel for Lady International did not in fact make such a motion.

The jury returned a general verdict for Lady International. Furr moved for a new trial and for a judgment notwithstanding the verdicrt. The trial court denied both motions, finding "the verdict returned by the jury was one of the possible verdicts that the jury could arrive at in its overview and determination of the facts in dispute."

Furr appealed on behalf of Lang and we affirmed. Lang v. Lady Int.l Op. No. 89-MO-080 (S.C. St. App. filed May 31, 1989); cert. denied, (Sept. 14, 1989. We stated in our opinion:

> The sole issue on appeal is whether there is any evidence in the record which would support a finding of contributory negligence. While appellant failed to draw an exception challenging the possible finding for respondent based on its general denial, we find there is sufficient evidence in the record to support a a finding of contributory negligence and therefore affirm.

Id. at 1-2

Lang then brought this action against Furr for breach of contract and legal malpractice. She claimed Furr was negligent in; (1) failing to move for a directed verdict at the close of the evidence; (2) failing to communicate an offer from Lady International to settle the case for $550,000 to $900,000; and (3) intentionally and repeatedly excluding Lang from participating in all phases of the suit, particularly jury selection, resulting in the seating of an antagonistic juror.

Prior to trial in this case, Furr moved an order excluding evidence of his failure to move for a directed verdict in the prior lawsuit and excluding reference by Lang's expert witness to ethical rules. The trial court granted these motions. At the close of all of the evidence, the trial court granted Furr's motion for directed verdict on Lang's claim Furr failed to allow her to participate in jury selection. The trial court sent the remaining malpractice issues to the jury. They returned a general verdict for Furr.

Lang moved for judgment notwithstanding the verdict and a new trial, which the trial court denied. This appeal followed.1

I.

Lang first argues the trial court erred in granting Furr's motion in *limine* to exclude evidence of Furr's failure to move for a directed verdict in the Lady International action.2 Lang argues we noted in our previous opinion the only issue before us was whether the jury could have found her guilty of contributory negligence,

---

1 Lang's appellate bried was prepared pro se and presented sixteen issues on appeal. At oral argument, however, Lang was represented by James H. Lengel. Mr. Lengel conceded a number of issues Lang raised were not preserved for appeal, and basically abandoned all but three of Lang's issues. We address only these three issues. See, e.g., Battery Homeowners Ass'n v Lincoln Fin. Resources, Inc., 309 S.C. 247, 422 S.E. 2d 93 (1992) (issue may not be raised for the first time on appeal); S.C. Code Ann. 14-8-250 (Supp. 1994); Rule 220 (b) (2), SCACR (we need not address issues that are manifestly without merit).

2 Lang's attorney proffered at trial for the record on appeal attorney Grover Seaton's deposition testimony in which Seaton states Furr's failure to move for a directed verdict was a breach of the standard of care. Hence, the ruling was preserved for appeal.

thus implying we would have found her guilty of contributory negligence, thus implying we would not reach the issue of the sufficiency of the evidence because it was not preserved.

The trial court correctly ruled our prior decision in this matter necessarily obviated Lang's malpractice claim based upon Furr's decision not to move for a directed verdict. At the time of Lang's injury, contributory was an absolute bar to her recovery. See Nelson v Concrete Supply Co., 303 S. C. 243, 399 S.E. 2d 783 (1991) (contributory negligence abolished in favor of comparative negligence for all causes of action arising on or after July l, 1991). We held the record contained "sufficient evidence from which the jury could conclude Lang failed to take reasonable care and her actions contributed to the injury which would not have otherwise occurred." Lang v. Lady Int'l, Op. No. 89-MO-080 (S.C. Ct. App. filed May 31, 1989), cert. denied, (Sept 14, 1989), at 3. Hence, even if Furr had made a directed verdict motion, the trial court would have erred in granting the motion without allowing the jury to pass upon the contributory negligence defense. Accordingly, as a matter of law, Furr's failure to move for a directed verdict did not harm Lang and cannot serve as the basis for a claim of legal malpractice.

Lang also argues the trial court erred in dismissing her claims that Furr was quilty of malpractice for failing to move for a directed verdict in the Lady International case because Judge Sidney Floyd had already denied a similar motion at a pretrial hearing. This issue is meritless. The denial of a motion for summary judgment decides nothing about the merits of the case, but simply decides the case should proceed to trial. Ballenger v Bowen, __S.C. __, 443 S.E. 2d 379 (1994). Denial of summary judgment does not establish the law of the cae and the issues raised

by the motion can be raised again at a later stage of the proceedings. Id.' see also McLendon v South Carolina Dept. of Highways & Pub. Transp., ___S.C.___, 443 S.E. 2d 539 (1994) (denial of a motion to dismiss, like the denial of summary judgment, does not establish the law of the cae, and the issue raised by the motion can be raised again at a later stage of the proceedings).

II.

Lang next argues ther trial court errd in granting Furr's motion in limine to exclude any reference by her expert legal witness, Grover Seaton, to specific ethical canons or ethical rules.3

The court granted Furr's motion in limine to exclude the evidence. This was not a final decision on the matter, and lang was required to proffer the testimony at trial to preserve the issue for appeal. State v Floyd, 295 S.C. 518, 369 S.E. 2d 842 (1988), South Carolina Dept. of Highways & Pub. Transp. v. Galbreath, ___S.C. __, 431 S.E. 2d 625 (Ct. App. 1993). Lang made no such proffer at trial, and has not explained in her brief on appeal exactly what evidence Seaton would have given about this issue.

Further, in response to Furr's motion to exclude references to ethical rules or canons, the trial cout ruled Seaton could testify "as to proper standard of care and that's it."

Seaton was qualified as an expert and testified extensively concerning the ways he believed Furr breached the standard of care. Assuming the court did in fact commit error in excluding the testimony, Lang has not demonstrated prejudice from the ruling,

See Otis Elevator, In. v. Hardin Constr. Co. Group,___S.C.---450 S.E. 2d 41 (1994) (absent a showing of prejudice, an appellate court will not reverse a judgment for an alleged error in the exclusion of evidence).

Finally, the Scope note to Rule 407, SCACR, which is intended to provide general orientation concerning the Rules of Professional Conduct, states:

> Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide
>
> guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies They are not designed to provide to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing counsel as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal consequence of violating such a duty.
> duty of lawyers or the extradisciplinary

Therefore, we find no error in the trial court precluding Seaton from testifying about specific Rules of Professional Conduct or Canons of Ethics which Seaton felt Furr violated.

III.

Lang argues the court erred in dismissing her allegation that Furr breached his standard of care in excluding her from jury selection. Colonel Larkin Spivey, an antagonistic juror whom Lang would have asked Furr to strike, was therefore allowed on the jury, and in fact served as foreman. Lang claimed Spivey, a neighbor of hers, knew her son and did not like him.

Lang's expert, Seaton testified Furr had the responsibility to share juror information with Lang and allow her to participate in jury selection. Seaton stated Furr breached the standard of care by not allowing Lang's participation.

---

3 Ostensibly, Lang wanted to establish Furr's violation of canons and ethical rules amounted to violation of a statute, or negligence per se.

The trial court waited until the end of all the evidence before ruling on Furr's motion to dismiss this claim. The court stated:

> I think at best, Ms. Lang's anxiety, concern and disagreement with -- viewing it in a light most favorable to her, of Mr. Furr's performance as to the juror Spivey, was what I referred to earlier as bedside manner. I do not think that it meets the standard since (Seaton) could not say to a reasonable degree of legal certainty that would have affected the outcome, I'm going back now and grant ... defendant's motion for a directed verdict on that issue.

In effect, the court was saying that even if Furr breached the standard of care in excluding Lang from the jury selection process, Lang's expert, Seaton, could not state Furr's actions had any affect on the verdict, that is, the seating of the allegedly antagonistic juror led to the verdict against Lang.

On appeal, Lang did not challenge this ruling by the trial court; therefore, it is the law of this case. Resolution Trust Corp. v. Eagle Lake and Golf Condominiums, ___S.C.___, 427 S.E. 2d 646 (1993).

We have reviewed Seaton's testimony and agree with the trial court that Seaton never stated Spivey's service on the jury affected the outcome of the earlier case. To recover in an action for legal malpractice, a plaintiff must establish three things: (1) the plaintiff has sustained injuries; (2) the defendant was negligent in one or more particulars; and (3) such negligence proximately caused, or at least was a contributing proximate cause. of the plaintiff's injuries. Shealy v. Walters, 273 S.C. 330, 256 S.E. 2d 739 (1979); see also Manning v. Quinn, 294 S.C. 383, 365 S.E. 2d 24 (1988) (the plaintiff must show that the action which the plaintiff claims the lawyer should have taken most probably would have been successful).

To presume Spivey's presence on the jury in the earlier case resulted in a unanimous jury verdict in favor of Lady International would be to engage in complete speculation, in view of Seaton's testimony. The jury in this case might draw that inference, but it would have no basis in the evidence. Accordingly, we affirm the trial court's dismissal of this allegation of malpractice from the case.

In summary, we conclude the judgment should be affirmed. As a final comment, we observe that "' {1} litigants, whether plaintiffs or defendants, are entitled to fair trials but not perfect trials.'" Ketterman v S.C. Farm Bureau Mut. Ins. Co., 302 S.C. 276, 279, 395 S.E. 2d 187, 189 (Ct. App. 1990), cert. denied, (Sept. 27,1990) (Citation omitted). From our thorough review of the lengthy record before us, we find that although the trial may not have been perfect, Lang received a fair trial.

AFFIRMED.

SHAW, CURETON, and CONNOR, JJ., concur.

APPENDIX B

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Teena Lang, ...Appellant,

v.

Lady International, International Fitness Center, Inc., Living Well Lady and Living Well Fitness Centers. . . .Respondents.

Appeal from Horry County
Frank P. McGowan, Jr., Judge

Memonrandum Opinion NO. 89-MO-080
Heard April 11, 1989 Filed May 31, 1989

AFFIRMED

James L. Merritt, Jr., of Law Offices of O. Fayrell Furr, Jr., of Columbia, for appellant.

John B. McCutcheon, Jr., and Mary R. M. Baxter, both of McCutcheon, McCutcheon & Baxter, of Conway, for respondents.

SHAW, j.: Appellant, Teena Lang, sued respondents, Lady International, International Fitness Center, Inc., Living Well Lady, and Living Well Fitness Centers, for personal injuries

suffered at a health spa. The jury returned a verdict for respondents and lang appeals. We affirm.

Lang joined the Lady International health spa in April of May, 1984 and worked out at the club practically every day. On July 16, 1984, while exercising at a lateral pull-down station of a universal weight machine, Lang was injured. This particular machine consists of a lateral bar connected to a pully cable which is attached to a set of weights. At the time of the accident, the bar was connected to the pulley cable by an open-ended "S" hook. Lang completed her repetitions on the machine, stood up and released the bar thus allowing the weights to fall freely causing the bar to come loose from the "S" hook and hit her on the head.

Lang sued the health spa alleging negligence and gross negligence. Respondents answered with a general denial and alleged contributory negligence on the part of Lang. The case was submitted to the jury which returned a general verdict for respondents.

The sole issue on appeal is whether there is any evidence in the record which would support a finding of contributory negligence. While appellant failed to draw an exception challenging the possible finding for respondent based on its general denial, we find there is sufficient evidence in the record to support a finding of contributory negligence and therefore affirm.

The record shows the health spa has a policy of giving an orientation program to new customers during which they are shown how to use the various pieces of exercise equipment. Orientation includes instructions on the use of the lateral pull-down

machine and patrons are told not to release the bar suddenly while the weights are under tension with the cable.

Although denied by Lang, there is evidence in the record from which the jury could conclude she did go through orientation. Staff instructor, Starr Coley, testified Lang's program card indicated she was given an orientation program. Manager, Holly Dennis, testified one of their instructors, Karen Kostyskyn, sold Lang her membership and that Kostyskyn was notorious for giving orientation immediately upon selling a membership. Although Kostyskyn could not recall who gave Lang the orientation program, she stated Lang definitely went through one.

There is also ample evidence from which the jury could conclude Lang was instructed to release the bar on the lateral pull-down machine slowly and not to let the weights clang. Kostyskyn stated that, in giving an orientation, she always warned the patrons to let the bar up slowly even if it meant stepping up on the seat to return the weights to their proper position. Coley testified she instructed patrons to release the bar slowly so the bar would not fly up allowing the weights to clang. Dennis likewise stated she instructed the patrons to release the bar easily and not to drop the weights. Further, a patron of the spa, Amy Gwinn, testified she was told to let the bar back up slowly and never let the weights clang.

Finally, there is evidnece in the record from which the jury could find that Lang released the bar in a manner which contradicted the instructions given her. There were no eyewitnesses to the accident and Lang testified she was unsure what happened. However, Kostyskyn, Dennis and Gwinn were all

present in the spa at the time of the accident and each testified to hearing the weights drop or clang.

Lang argues that even if these instructions were given to her, they were inadequate as they were given only to protect the machine, prevent loud noise and allow the patron to receive the full benefit of exercise. She argues because the instructions were not given as a user safety consideration, injury was not something she anticipated and, therefore, failure to follow these instructions would not amount to contributory negligence. We disagree.

All that is necessary to establish the defense of contributory negligence is to prove to the satisfaction of the jury that the injured party id not, in his own interest, take reasonable care of himself and contributed, by this want of care, to his own injury. Woods v. Rabon, 295 S.C. 343, 368 S.E. 2d 471 (Ct. App. 1988. Under the facts of this case, we find the instructor's reasoning behind giving the instruction irrelevant. There is sufficient evidence from which the jury could conclude Lang failed to take reasonable care and her actions contributed to the injury which would not have otherwise occurred. AFFIRMED.

SANDERS, C.J. AND LITTLEJOHN, A.J., concur.

APPENDIX C
15a

THE SOUTH CAROLINA COURT OF APPEALS

Tenna Phipps Lang. . . . . .Appellant,

v.

O. Fayrell Furr, Jr.. . . . . Respondent.

ORDER DENYING PETITION
FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and,hence, there is no basis for granting a rehearing. It is, therefore, ordered that the Petition for Rehearing be denied.

/s/ Curtis G. Shaw , J.

/s/ Jasper W Cureton , J.

/s/ Carol Conner

Columbia, South Carolina
August 23 , 1995.

APPENDIX D
16A

THE SUPREME COURT OF SOUTH CAROLINA
February 22,1996

REGULAR AND CERTIFIEDF MAIL

Mr. Tenna Phipps Lang
304 Club Drive
Myrtle Beach, S. C. 29572

Re: Tenna Phipps Lang v O. Fayrell Furr

Dear Ms. Lang:

This Court has issued the following Order on you Petition forWrit of Certiorari in the above entitled matter:

"Petition for Writ of
Certiorari denied."

February 22, 1996 /s/ Ernest A. Finney, Jr., C.J.
For the Court

By copy of this letter we are advising all interested parties of the action of the Court in this matter.

Very truly yours,BFS/dmh
/S/ Brenda F. Shealy
DEPUTY CLERK

BFS/dmh
Copy to: Charles J. Baker, III, Esquire
Stanley C. Rodgers, Esquire
The Honorable Kenneth Richstad
The Honorable Billie G. Richardson
West Publishing Company

APPENDIX E

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

May 22, 1996

Ms. Tenna P. Lang
304 Club Drive
Myrtle Beach, SC 29572

Re: Tenna Phipps Lang
v. O. Fayrell Furr, Jr.
application No. A-960

Dear Ms. Lang:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to the Chief Justice, who on May 22, 1996, extended the time to and including June 22, 1996.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
By: /s/ Troy D. Cahill
Assistant Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

Notification List

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Myrtle Beach, SC 29572

Mr. Charles J. Baker
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Suite 202
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